No. 12956.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLARENCE W. MOSELEY,

Appellant,

vs.

LAWRENCE C. MOSELEY, EDWARD S. FRANZUS, SANITEK PRODUCTS, INC., a corporation, and 111 SOUTH GAREY CORPORATION, a corporation,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

An examination of the appellee's brief in this matter shows that his only defense is based upon his interpretation of a single paragraph in the contract between the parties. This is paragraph 5 of the agreement dated August 31, 1945, between Lawrence and Clarence Moseley, which is Exhibit A of the complaint. [Tr. pp. 16-20.] The paragraph in question reads as follows:

> "5. It is mutually agreed that Lawrence C. Moseley shall have the sole right to represent said partnership interest and to make all decisions and take all action in respect thereto, and, subject to the obligation to account to Clarence W. Moseley, as aforesaid, shall have all rights and powers with respect to said partnership interest which he would have were said interest his own property free of these trusts."

On the basis of this paragraph the appellee would have the court read into the agreement an authorization to the trustee to sell the trust property to himself at a value to be fixed by a court, and without interest on the purchase price until such time as the valuation is so fixed.

Provisions similar to paragraph 5 are found in practically all formal trust agreements, and we think the court might take judicial notice of this fact, and of the further fact that the purpose is to give the trustee broad powers in conducting whatever the business of the trust may be, and that there is no intention, by any such clause, to relieve the trustee of any fiduciary obligations which the law or the agreement otherwise impose upon him.

We venture to say that it would be difficult to find a will creating a trust or a formal *inter vivos* trust instrument written in recent years which does not contain a similar clause. The following is an example from a form book circulated among attorneys by Security-First National Bank of Los Angeles:

> "The enumeration of certain powers of the Trustee shall not limit its general powers, the Trustee, subject always to the discharge of its fiduciary obligations, being vested with and having all the rights, powers and privileges which an absolute owner of the same property would have." (Page 19 of Fifth Edition, 1948.)

Any suggestion that the intention of paragraph 5 was to free the trustee in our case from his normal fiduciary obligations is met by the language of the paragraph itself. The powers are granted ". . . subject to the obligation to account to Clarence W. Moseley, as aforesaid, . . ." An explanation of what ". . . account . . . as aforesaid"

means will be found by reference to paragraph 4, wherein Lawrence agrees ". . . to faithfully account to Clarence W. Moseley for the latter's share of the partnership share or interest so represented by him, together with all profits accruing thereto." The language of the Security Bank form, ". . . subject always to the discharge of its fiduciary obligations, . . ." might have been preferable, but we submit that they mean the same thing. The obligation of a trustee to account to his beneficiary is an obligation to perform the duties which the law or the agreement impose upon him. There is nothing in the agreement to suggest any different meaning. The contention that the grant of broad powers, subject only to the duty to account, was intended to imply that the trustee was to be free of the usual restrictions implied by law which prevent the trustee from dealing with the property for his own purposes, would seem so extreme that it hardly merits a reply. Yet that is the appellee's entire case.

There are certain specific provisions, as the appellee points out, in regard to dissolution. The implication of these, however, is clearly contrary to appellee's position that the only duty of the trustee was to pay to the beneficiary the money value of the trust assets as determined by him or by the court. Paragraph 2 of the agreement specifies the percentage of capital assets owned by each of the parties, and provides that "upon any distribution thereof by the partnership, Lawrence C. Moseley shall *forthwith pay or deliver* to Clarence W. Moseley fifty per cent of all *moneys and properties* distributed to him in respect of such interest." (Emphasis added.) Paragraph 3 specifies the percentage in ordinary earnings owned by each of the parties, and provides that ". . . upon any dis-

tribution thereof, Lawrence C. Moseley shall forthwith *pay or deliver* to Clarence W. Moseley twenty-five per cent of all such earnings distributed to him in respect of such share or interest." These provisions not only do not limit the accounting duties of the trustee to an obligation to pay money, but clearly negative any such idea.

The only other reference to dissolution is the provision at the end of paragraph 3, which specifies that undistributed earnings shall belong to the parties in a certain ratio, and that ". . . upon any distribution, liquidation, or other termination of the partnership, the interests of the parties hereto shall be adjusted accordingly." This relates to, and is made necessary by, the provisions of the contract to the effect that Clarence's share in the capital was fifty-fifty with Lawrence, but the sharing of the earnings was 75% to Lawrence and 25% to Clarence.

The two brothers jointly had a 50% interest in the main partnership between Lawrence and Franzus. Therefore, in the net worth of the main partnership, Clarence and Lawrence each had 25% of the capital, but Lawrence had 37½% of undistributed earnings accrued after January 1, 1945, the effective date of the agreement, and Clarence had only 12½%.

Upon any distribution of money remaining after payment of debts of the partnership and expenses of winding-up, reference would have to be made to the books to see what the capital was, and this, as far as the brothers were concerned, would be the net worth of the business on January 1, 1945, when the agreement commenced. Of this amount Lawrence would get 25%, Clarence 25%, and Franzus 50%. Any sums remaining over and above this figure would represent earnings accrued after January 1,

1945, and not theretofore distributed to the partners. Such earnings would go 50% to Franzus, 37½% to Lawrence, and 12½% to Clarence. Since only ordinary earnings were to be divided in the last mentioned proportions, if any part of the surplus represented capital gains, that would go in the same ratio as the capital above mentioned.

These provisions for adjustment on liquidation might indicate that payment would be made in money, although conceivably it would be possible to identify certain specific properties as capital assets, and if they were of a fungible or uniform nature, they could be distributed in kind. However, if the distribution is to be made in money, there is nothing to suggest that the money is not to be the result of the sale of assets in the traditional manner for the winding-up of partnerships, to which all the partners are entitled, in the absence of agreement to the contrary. Yet the appellee asserts that it authorizes the trustee to take the assets for his own use, subject only to the obligation to pay to the beneficiary their value at the date of taking, without interest! Surely a right so contrary to the fundamental rules governing fiduciaries should not be read into a contract, unless expressly stated. It should be noted in this connection that no evidence was taken by the court below in explanation of the contract, so that this court is in the same position as the trial court was in interpreting the document. [Tr. p. 48.]

There is no dispute about the facts in the case, as comparison of the statements in the two briefs will show, other than the assertion by the appellee that he was at all times willing to fully account to the plaintiff, and to pay to plaintiff any sums found due on said accounting. (Appellee's Br. p. 6.) As shown in our opening brief, at

page 23, and as clearly appears from the appellee's brief, this is simply a question of the meaning of terms. Lawrence has never been willing to do anything more than to account for earnings up to October 31, 1947, and to pay to Clarence the value of his share in the business as of that date, first as determined by Lawrence, and later as determined by the court. . He has never been willing to account as we understand the meaning of the term. He didn't even tell his brother what had happened until twelve days after he and Franzus had taken over the assets. [Letter of November 12, 1947; Tr. p. 65.]

Counsel for the appellee states, at page 21 of the appellee's brief:

> "We have no quarrel with the principles of law enunciated by the cases and authorities cited by Plaintiff's counsel in their opening brief."

Being in agreement on the facts and the law, they are driven to the position, and boldly take it, that the terms of the contract authorized the trustee to take over the property which was the subject of the trust, and use it for his own purposes. On the same page they say:

> ". . . Clarence, by express provision, gave his brother Lawrence the right to treat with the property as his own, free of any trust obligation, and free of all obligation, except the duty to account, in the event of termination or dissolution of the Lawrence-Franzus partnership."

They consider the duty to account to be of no importance, or at least that all it means is that the trustee can buy

out his beneficiary any time the trustee pleases. Again, at page 19, in the first paragraph, they speak of:

> ". . . the narrow, limited obligation to pay over and account for the amount due Plaintiff, when, as, and if a termination and dissolution of the Lawrence-Franzus partnership should occur."

The argument takes another form on page 11 of appellee's brief, by pointing out things that the contract did not prohibit or contain. Obviously we are not concerned with this. The contract imposed the duties of a trustee upon Lawrence, as did his position of being a partner in possession of partnership assets, and he cannot escape the legal obligations which arise from this position unless the contract expressly or by inescapable implication relieves him thereof.

In regard to the assertion on page 11 that the law does not require partners to necessarily obtain a judicial winding-up, but that it may be done by agreement between themselves, this is, of course, true, and it is the normal way to do it. We further agree that Clarence had no right to prevent the dissolution of the Lawrence-Franzus partnership. When that happened, however, Lawrence was under certain duties to Clarence, which he cannot escape unless the contract permits him to do so, and we are willing to stand or fall upon the proposition that it does not. The argument of counsel for the appellee overlooks the fact that Lawrence was not only a partner of Franzus, but he was also a partner of and trustee for his brother Clarence. Whatever rights he had in relation to Franzus were limited by his duties to Clarence. He was not in a position to make any agreement with Franzus for the disposition of the assets unless Clarence joined in the agreement.

Not only was the freedom of Lawrence to deal with his partner Franzus limited by Lawrence's obligation to his other partner, Clarence, but Clarence, as a sub-partner, had a direct right to an accounting running against both Lawrence and Franzus as members of the main partnership when that partnership was dissolved. The cases cited on page 13 of appellee's brief do not deal with that situation. We concede the law to be that a sub-partner is not a partner in the main partnership, and has no rights in respect of the main partnership until dissolution occurs, or other circumstances arise which give a right of accounting to the member who is also a member of the sub-partnership. Then, as shown by the cases cited in our opening brief, at page 18, the law takes a short cut, and allows the sub-partner to come in and claim his share of the assets of the main partnership. There is nothing inconsistent between these cases and the cases cited by appellee.

In *Zeisler v. Steinman,* 53 N. Y. Super. 184, the plaintiff brought an action against his brother, the defendant Zeisler, for dissolution of an "alleged co-partnership between them" of which the defendant Steinman was not a member, and "to that end" plaintiff demanded that "the defendants be enjoined from carrying on the business of the co-partnership existing between them under the firm name of C. B. Steinman & Co." This the court refused to do. It did not appear that the Steinman partnership had been dissolved, or that any other circumstances existed which gave the other defendant, the plaintiff's brother, a present right to an accounting or winding-up of that firm.

O'Connor v. Sherley, 107 Ky. 70, 52 S. W. 1056, merely holds that a sub-partner is not a member of the

main firm, and therefore is not liable to creditors of the main firm upon its debts.

In any event, while they represent an interesting bit of little-used law, the cases on sub-partnership are not necessary for the appellant's position. Whatever the relationship, or lack of it, might have been between Clarence and Franzus before dissolution, when the main partnership was dissolved, unless we are wrong about what the agreement means, Lawrence had a duty to account to his brother Clarence, and it was a violation of this duty for him to join with Franzus in taking over the assets for their own purposes. Franzus and the other defendants are chargeable with knowledge of the plaintiff's rights, and they took the property subject to all of those rights. As said by the Supreme Judicial Court of Massachusetts in *Lovejoy v. Bailey,* 214 Mass. 134, 101 N. E. 63 at page 70 (cited in our opening brief at p. 18), "Bailey stood in a fiduciary relation both to Fowle and to Lovejoy. The other defendants, taking the property which was the subject of that fiduciary relation from Bailey, with notice of the rights of Fowle and of Lovejoy, gained no greater rights than those of their grantor."

Regardless of what the rights of a sub-partner may be in general, it was the duty of the defendant Lawrence to exercise whatever rights he had against defendant Franzus, in order to render a proper accounting to plaintiff Clarence. There can be no doubt that upon the dissolution of the main partnership, Lawrence had the right to cause it to be wound-up by a judicial proceeding, and Franzus would have no right to complain. Clarence, in the absence of an agreement between the three interested parties, had the right to insist that Lawrence exercise this right. No transfer of the assets to the defendant

corporations, or anyone, taking with knowledge of Clarence's rights, could cut them off.

The other cases and authorities cited by the appellee on the main point merely exemplify or state obvious principles of law, which have no bearing here.

The cases cited on page 16 to the effect that where an amount owed cannot be determined without an accounting, interest will not be allowed until the sum is liquidated by the accounting, also are not applicable here. We come back again to the interpretation of the contract. If, upon a dissolution of the main partnership, and consequent dissolution of the sub-partnership and termination of the trust agreement, the appellant was entitled only to have the value of his share of the business determined and the amount paid over to him, there might be merit in this contention, although even as to this the appellee errs when he says that he was at all times willing to give to plaintiff such an accounting, and that plaintiff refused to accept it. Upon the dissolution of the main partnership, the only offer which Lawrence made to account was that set forth in his letter of November 12, 1947. [Pltf. Ex. 2, Tr. p. 65.] In that letter he offered, as one alternative, to pay $20,000.00 to buy Clarence out. This was not a definite offer. There was simply an admission that Clarence's share should be worth that much. Afterwards Lawrence came down on his figure, and paid $14,872.36 into court. [Tr. p. 21.] After judgment he increased the deposit to the amount of the judgment. [Tr. p. 37.] If this is what is meant by accounting, it is true that the plaintiff, the appellant here, has refused to accept it, and still refuses to do so.

If we are correct in our contention that the duty to account imposed upon the appellee by the agreement of

August 31, 1945, is simply the duty to discharge the obligations of a fiduciary to the appellant, as determined by the law of partnership and the law of trusts, and if it follows, as we maintain, that the appellee had no right to take over the assets for his own purposes by agreement with Franzus or anybody else, and that this, in effect, amounted to a conversion of the property, or rather of the appellant's share therein, then one of the remedies of the appellant is to be paid the value of the property at the date of conversion, with interest at the legal rate on such value. This is an alternative remedy which the law gives in a case of conversion of property, whether by a trustee or anybody else, and the fact that the value has to be determined is immaterial. As stated in 8 Cal. Jur. 791:

> "The fact that proof of the market value of goods is required to establish the amount of a claim does not render it incapable of being made certain by calculation, so as to prevent the allowance of interest under Section 3287 of the Civil Code."

The section referred to reads as follows:

> "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt."

Again we wish to point out that the remedy of recovering the value of his share at the date of conversion is not one which the appellant has elected, but if he is re-

quired to take it, it would seem clear that he is at least entitled to interest on such value.

It is conceded that on $750.00 of the judgment interest should not be allowed, since that represented merely a striking of a balance between the brothers upon an accounting of earnings for the period prior to October 31, 1947.

In support of his contention that plaintiff had no rights against Franzus or the corporations, and that they were properly dismissed, the appellee, at pages 19 and 20 of his brief, cites cases to the effect that where a trustee has an express power of sale, the purchaser is not bound to see to it that the trustee properly applies the proceeds, or otherwise carries out the terms of the trust. We have no quarrel with these cases, but they have no application here for two reasons: There is no express power of sale in the trust instrument we are considering, and, even if there were, it would surely not authorize the trustee to sell to himself, or to himself and another associated with him.

In their brief, counsel say at page 16 that the appellant insists on a continuing indefinite liability on the part of his brother Lawrence, and again, on page 22, they say it must be apparent that the real objective of Clarence is to perpetuate his former interest in the Lawrence-Franzus partnership for an indefinite period of time, and to accomplish a reformation of the contract. It is true that at the trial we did suggest that the incorporation of the business was merely a transparent scheme by which Lawrence sought to get rid of Clarence's interest [Tr. p. 54], that the substance of the situation had not been changed [Tr. p. 78], and that the court should require Lawrence

to perform the contract in the same manner as he would have done had the partnership remained, at least until a proper winding up is had, and we still maintain that.

We further argued that if the contract gave Lawrence the power to incorporate the business, Clarence at the very least should be entitled to have the stock substituted for the partnership interest as the trust *res,* and that the agreement should otherwise be carried out as if the partnership still existed. It seems clear, however, that Lawrence had no authority under the agreement to incorporate the business. The very clause of the contract upon which his entire claim of power is based [Par. 5, Tr. p. 19], gives him only "the sole right to represent said partnership interest," and this is followed by the grant of powers we have discussed, which therefore relate only to a *partnership* interest.

We further concluded that the trial court was correct in holding that Lawrence had a right to terminate the main partnership, because there was nothing in the contract that prevented him from doing so, and the contract provided no fixed term for its continuance. The case, it seems to us, inescapably comes down to the issue of what the duties of Lawrence were *when this event occurred.* Counsel for Lawrence apparently take the same view, and we also appear to be in agreement that the case must be decided on the narrow ground of whether or not the contract authorized Lawrence to take over the assets for the use of himself and Franzus, at a valuation for Clarence's share to be fixed by the court, without interest on such value until so fixed.

If we are right that there is no provision of the contract, express or implied, remotely suggesting any such variation from elemental trust law, then there has been

a breach of trust by Lawrence, and if Clarence should elect a remedy which may result in delaying Lawrence's desire to get rid of him and to cut off his share of the profits, Lawrence has only himself to blame. He and Franzus could have had the business put up for sale in 1947, and they can still do so. Clarence insists only upon the right to put his own valuation on the business by bidding at such a sale, and to receive his share of the earnings until such a sale is had, or until an agreement is reached by all who have the right to agree.

Respectfully submitted,

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